83-379

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESTATE OF CORDIAL GRYDER, Deceased,
PANSY GRYDER, Executrix,
and
PANSY GRYDER,
Petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether, within the framework of 26 U.S.C. §6501, the Commissioner of Internal Revenue may arbitrarily, and to the prejudice of taxpayers, delay civil tax proceedings pending trial of criminal proceedings against one of the taxpayers, where the Commissioner by his investigation was fully aware of the omissions and alleged tax delinquencies for at least three years prior to the notices of assessment.

II.

Whether hearsay secondary evidence of proceedings at an earlier criminal trial of only one of the taxpayers should have been excluded under Rules 801, 804 and 1004 of the Federal Rules of Evidence, where essential corporate records had been lost or destroyed by the Commissioner.

III.

Whether petitioner Pansy Gryder was an innocent spouse entitled to relief from tax liability under 26 U.S.C. § 6013(e), because she took no part in her husband's business activities and did not know or have reason to know of omissions from tax returns prepared at the behest of the husband, and because she received no significant benefit from the omissions, including whether property received by the wife long after the alleged fraudulent conduct of her husband and only as a result of his death and operation of the law of inheritance can be considered a significant benefit under § 6013(e)(1)(C).

LIST OF PARTIES

Petitioner Pansy Gryder is the widow of Cordial D. Gryder, who died in December, 1975, and she was Executrix of his Estate, a petitioner herein. She has remarried and is now Pansy (Mrs. Carl) Woolbright. She resides in Rolla, Missouri.

Financial affairs of two non-public Missouri corporations were involved in these proceedings: DeVille Motors, Inc. and Gryder Motors, Inc., now known as Woolbright Motors, Inc.

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OPINIONS BELOW

This cause was decided on April 29, 1983, by a panel of the United States Court of Appeals for the Eighth Circuit (Bright, Arnold, and John R. Gibson, Circuit Judges), in an opinion reported in *Estate of Gryder* v. *Commissioner,* 705 F.2d 336 (8th Cir. 1983). The opinion is reproduced as Appendix A hereto.

On June 9, 1983, the Court of Appeals entered an order denying petitioners' petition for rehearing and suggestions for rehearing en banc. (See Appendix B.) No opinion was written and the order has not been officially reported.

These civil tax proceedings were tried for seven days by the Hon. Irene F. Scott, Judge of the United States Tax Court. On August 27, 1981, she filed Memorandum Findings of Fact and Opinion, reported as *Estate of Cordial Gryder,* T.C. Memo. 1981-466. Excerpts which are relevant to this petition are reproduced as Appendix C hereto. (On Septemeber 15, 1981, Judge Scott entered an order of typographical amendment, not relevant to this petition. The change is contained in T.C. Memo. 1981-466.)

The original opinion of Judge Scott stated that decision would be entered under Rule 155 of the Tax Court. On January 15, 1982, Judge Scott entered decisions in each case, which have not been officially reported but are reproduced as Appendix D and E hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 29, 1983. (See Appendix A and F.) Petitioners filed a timely petition for rehearing and suggestion of appropriateness of rehearing en banc, which was denied on June 9, 1983. (See Appendix B.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This petition involves an interpretation of the Fifth Amendment to the Constitution of the United States, the text of which is set out in Appendix G.

This petition also involves an interpretation of two federal tax statutes, Title 26, United States Code, § 6013(e), pertaining to innocent spouse, and Title 26, United States Code, § 6501, pertaining to the statute of limitations in civil tax matters. The text of these statutes is set out in Appendix H.

This petition also involves an interpretation of Rules 801(c), 804, and 1004 of the Federal Rules of Evidence, with reference to the loss or destruction of documents and the use of hearsay secondary evidence. The text of these Rules is set out in Appendix I.

STATEMENT OF THE CASE

This petition involves issues created during the trial of proceedings in the United States Tax Court.

Cordial Gryder and Pansy Gryder were husband and wife, who filed joint tax returns for the years 1967 through 1971. The Commissioner of Internal Revenue assessed additional taxes and fraud penalty additions against them for those years. With a few minor exceptions, the assessments were based on alleged additional income to husband as a result of his activities in an automobile business known as Deville Motors, Inc., and in 1971 with Gryder Motors, Inc., both Missouri corporations. The issues in the assessments against husband and wife related to whether they had additional income for the years involved, and, if so, whether additional taxes and penalties could be assessed against husband's estate and against wife individually. (Husband died on December 3, 1975.)

Deville Motors had also filed tax returns for the calendar years 1967 through 1970, and the Commissioner assessed additional taxes and fraud penalty additions against the corporation for those years. Transferee liability was asserted against husband. The basis of the assessment against Deville Motors was additional income, which, for the most part, related to the same items assessed against husband and wife individually.

In 1975, husband was a defendant in a criminal proceeding in the United States District Court for the Eastern District of Missouri, charging him with felony violations of 26 U.S.C. § 7206(1), filing of false tax returns for the subject years. Wife and the corporations were not defendants. While husband's ap-

peal from his conviction was pending in the United States Court of Appeals for the Eighth Circuit, he died, and pursuant to order of the Court of Appeals dated December 23, 1975, the judgment of conviction was vacated and the action was dismissed as moot.

After the death of husband and on February 5, 1976, the Commissioner mailed to husband and wife notices of deficiency in taxes ($70,440.42) for 1967 through 1971, and fraud penalty additions ($37,589.92) under 26 U.S.C. § 6653(b). On July 21, 1976, a notice was mailed to husband asserting liability as transferee of assets of DeVille Motors for the years 1967 through 1970, in the amounts of $110,402.00 deficiency and $56,342.00 penalty additions.

Husband's estate, by wife as executrix, and wife filed petitions in the Tax Court, and the proceedings were ultimately consolidated and tried jointly in St. Louis, Missouri. The trial lasted seven full days: March 12-14, 1980, and July 22-25, 1980.

On August 27, 1981, the Tax Court (Hon. Irene F. Scott, Judge) entered Memorandum Findings of Fact and Opinion (T.C. Memo. 1981-466), which generally found the issues in favor of the Commissioner. Except for disallowance of the assessment for gain on sale of a residence, the Tax Court approved the assessment of additional taxes against husband's estate and wife as to the individual returns and against husband's estate as transferee of DeVille Motors. In addition, the Tax Court affirmed the fraud penalty additions to the tax, under 28 U.S.C. § 6653(b), against husband's estate in both cases, but the Court found no fraud as to wife.

After entry of the decisions of the Tax Court, husband's estate and wife appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the Tax Court in *Estate of Gryder* v. *Commissioner*, 705 F. 2d 336 (8th Cir. 1983). To review that decision, the estate and wife now file this petition for Writ of Certiorari.

The facts material to consideration of the questions presented by this petition are as follows:

Henry Purk and Harry Schuler were revenue agents who conducted and supervised the investigations of the personal returns of husband and wife and of DeVille Motors respectively, for the tax years involved. They testified that their investigations began in 1970 or 1971 and were completed and reports were turned in during the latter part of 1973 (Tr. 976, 2173, 2281, 2318). In May and June, 1975, husband was tried on the criminal charges. He died on December 3, 1975. As previously indicated, notices of deficiency were mailed by the Commissioner in February and July, 1976, thus creating the statute of limitations issue (Question I) presented for review in this petition.

Prior to the commencement of the Tax Court proceedings, the government had obtained many corporate and other documents by voluntary delivery or grand jury or criminal trial process. After the criminal proceedings, these were retained in the custody of various government personnel connected with the criminal proceedings and the tax proceedings. While being so retained and stored, they were destroyed after a person identified as Agent Purk told Ms Tucker, the person in charge of the storage room, that Mr. Gryder was dead and inquired as to why she was still storing the documents (Tr. 50-52). She thereupon initiated proceedings for destruction of the documents, as a result of which twenty boxes containing most of the documents crucial to this case were destroyed by the government (Tr. 42-46).

Upon discovering that the documents had been destroyed, the Commissioner at trial sought to introduce secondary evidence of the documents, consisting primarily of photocopies and transcripts of testimony during the District Court criminal proceedings. The District Court transcript (hereinafter referred to as "Cr.Tr.") was available, but most witnesses who testified in the Tax Court, including two crucial witnesses (Mrs. Hoch, the

bookkeeper, and Mr. Blum, the accountant for Deville Motors) had no recollection of the documents or their significance. The Tax Court allowed the use of such secondary evidence under Rule 1004 of the Federal Rules of Evidence, and Question II presented for review relates to such ruling and its affirmance by the Court of Appeals.

The third Question presented by this petition is whether wife was entitled to relief from assessment of taxes as an innocent spouse, under 26 U.S.C. § 6013(e). The evidence indicated that husband ran the business and corporate affairs, and that wife had nothing to do with business activities. Husband handled all of the finances; household expenses were paid by husband or through the business (Tr. 2000, 2344-2349).

In the course of business activities, husband accumulated several parcels of real estate, some of which were obtained in trade on motor vehicles sold by Deville Motors. Husband apparently caused the title to be placed in the individual names of husband and wife because he had been informed that it was easier to deal with the property in individual rather than corporate names (Cr.Tr. 2345-2346). Some real estate paid for by the company was also used for business purposes, as were boats in husband's or husband's and wife's names. Husband had also purchased country property which he remodeled into a residence for husband and wife, but which also had recreational facilities for boating, fishing, hunting, horseback, etc.; these were used from time-to-time by business customers (Tr. 2354-2355).

Wife testified that she was unaware of the real estate transactions but signed various documents upon demand by husband without question. She learned the details of the property only after the death of husband. One piece of property was in husband's name and required probate proceedings, and several other parcels were in joint names of husband and wife as tenants by the entireties with right of survivorship. Wife received the

property, subject to existing encumbrances, as heir through probate proceedings or by operation of law as surviving joint owner (Tr. 2365-2371).

Additional discussion of the facts relevant to the Questions presented for review is contained in the Argument portion of this petition.

ARGUMENT

I.

Delay (Statute of limitations)

Limitations on assessments of taxes are generally covered by 26 U.S.C. § 6501. Ordinarily there is a three year statute of limitations, as contained in § 6501(a). However, the statute further provides (§ 6501(c)(1)) that there is no limitation in the case of fraud, or (§ 6501(e)) that a six year period applies to a substantial omission of items.

Petitioners believe that, even if there was fraud or a substantial omission, the three year statute should apply in this particular case because of the proof of government inaction. IRS Agent Purk testified that he turned in the case as to the individual taxpayers in November or December, 1973 (Tr. 2318). Agent Schuler testified that after more than 3500 hours of work, his report as to Deville Motors was turned in in September or October, 1973 (Tr. 2173). Thus the investigations were fully completed long before the statutory notices which were issued on February 5, 1976 and July 21, 1976 — after the death of husband.

The concept of extending the statute of limitations for fraud or substantial omission cases is based upon the recognition that in a fraud case, the fraud may not be fully uncovered during the three-year period, and in a substantial omission case, the amounts and issues involved may be so substantial that a routine investigation within the three-year period will not suffice. Consequently, a limitation to three years would be unduly harsh upon the Internal Revenue Service.

But here there was a full investigation which began in 1970 or 1971 (Tr. 2173) and was completed in due course, and then no action for a long period of time thereafter. No explanation was given by the Commissioner as to why the Internal Revenue Ser-

vice delayed so long after the completion of the reports to issue the statutory notices.[1]

The purpose of a six-year rather than three-year period of limitations in a substantial omission case was discussed in *Taylor* v. *United States,* 417 F. 2d 991, 993 (5th Cir. 1969), where it was said:

> "In enacting section 6501(e)(1)(A), Congress intended to give the Government additional time to investigate tax returns in those cases where a taxpayer's failure to report a taxable item puts the Government at a special disadvantage to discover the omission in the usual three-year period. Colony, Inc. v. Commissioner of Internal Revenue, 1958, 357 U.S. 28, 78 S.Ct. 1033, 2 L.Ed. 2d 1119. This Court has long recognized that the extended period of limitations applies when there is no disclosure of an item of income on the face of a tax return. . . .It is manifest then that the Government is not to be penalized by a taxpayer's failure to reveal the facts. As Congress recognized, the Government cannot be required to act promptly on information that is not known to it."

But as pointed out by this Court in *Colony, Inc.* v. *Commissioner,* 357 U.S. 28, 36-37 (1958), where the Commissioner has

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[1] In his brief and oral argument in the Court of Appeals, the Commissioner advanced the novel argument that he was authorized to delay the civil tax proceedings while the criminal proceedings were pending, in order to get his "first bite" at taxpayers through the criminal proceedings, with the hope of being able to use the collateral estoppel doctrine in the civil case. But collateral estoppel was not applicable here because of the death of husband, the lack of a final conviction, and the fact that wife was not a party to the criminal proceedings. Nor does the doctrine justify deliberate delay, with resultant prejudices to the taxpayers, in order to give the government an opportunity to try to get a criminal conviction first. We respectfully suggest that, if the statute of limitations is to be tolled during pendency of criminal proceedings, at the very least Congressional action is required for such a rule.

notice of an omission by virtue of a disclosure on the return — or, we submit, notice by virtue of a full investigation — his actions should be taken within three years.

The problem is particularly serious in this case because, if the Commissioner had been more diligent in asserting his position against petitioners, husband would have been available at trial as a live witness rather than in the form of a transcript of a criminal trial in which the issues were different. In addition, records would have been available rather than having been lost or destroyed by the Commissioner, and witnesses would have been able to testify with realistic recall.[2] Consequently, petitioners were substantially prejudiced by the delay and were deprived of due process of law, contrary to the Fifth Amendment to the Constitution of the United States.[3]

In summarily rejecting petitioners' argument concerning the delay, the Court of Appeals applied a literal interpretation of § 6501(c)(1) — no limitation period for a fraud case — but the Court failed to recognize the significance of the termination of the tax investigation long before the assessments. Compare *Klemp* v. *Commissioner,* 77 T.C. 201 (1981),[4] and *Dowell* v. *Commissioner,* 614 F. 2d 1263 (10th Cir. 1980). As recognized

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[2] Especially important, as recognized by the Tax Court (Tr. 1722-1724), in a case such as this, where the burden of proof as to taxes assessed was upon petitioners.

[3] As to the effect of such unreasonable delays, even before the passage of a statute of limitations, compare *United States* v. *Lovasco,* 431 U.S. 783 (1977).

[4] It is interesting to note that Judge Scott, who wrote the Tax Court opinion in the instant case, is apparently not in the mainstream of the law with reference to the statute of limitations, for she joined the dissenting opinion in *Klemp* v. *Commissioner.*

in *Dowell* (at p. 1265), the concern is "with something which *starts* the period [of limitations]", and (at p. 1266) "[t]he purpose of §6501(c) is to provide the Government time to unearth information the taxpayer did not furnish and to file an assessment." In the instant case, the government had more than adequate time.

In footnote 6 of the opinion, the Court of Appeals recognized the split of authority created by cases such as *Dowell* applying the three-year statute, and *Badaracco* v. *Commissioner*, 693 F. 2d 298 (3rd Cir. 1982), to the contrary. On May 16, 1983, this Court granted certiorari (____U.S.____, 103 S.Ct. 2084) as to *Badaracco* in Cases No. 82-1453 (*Badaracco*) and No. 82-1509 (*Deleet Merchandising Corporation*). See also *Nesmith* v. *Commissioner*, 699 F.2d 712 (5th Cir. 1983), petition for cert. filed June 3, 1983 (No. 82-2008).

This petition clearly presents the issue of whether the Commissioner may arbitrarily delay civil tax proceedings, to the prejudice of taxpayers. We have not found any cases in which this precise issue has been determined, but we believe that it is similar to the issue to be considered by this Court in *Badaracco* and *Deleet*. Furthermore, the decision of the Eighth Circuit herein conflicts with the philosophy of the Third Circuit in *Taylor* v. *United States, supra,* and of this Court in *Colony, Inc.* v. *Commissioner, supra.*

For all of these reasons, we respectfully suggest that a definitive ruling by the Court on the issues presented by this Question is important in the administration of tax laws, and that conflicts should be resolved between the decisions herein and other decisions, a conflict apparently recognized by this Court in the granting of certiorari in the *Badaracco* case. Accordingly, certiorari should be granted as to this Question.

II.

Missing records

Numerous records essential to a trial of this case were missing and not produced in evidence in the Tax Court. The record made by the Commissioner is unclear as to whether these were lost or destroyed by his agents, or merely missing; the record was certainly not as clear as the Tax Court attempted to portray at the outset of its opinion.[5]

At the conclusion of the trial, the record was still terribly confusing as to what happened to the records. Ms. Tucker, the custodian, said that she destroyed them. Agent Purk said that he took them out of the files before destruction and delivered them to attorney Voelker. Mr. Voelker said that some documents (exact identity unknown) were returned to Ms. Tucker's department and presumably destroyed, but that he retained others (exact identity unknown), which apparently were not destroyed but just could not be located. We submit that the evidence as to search for the missing documents was not sufficient to conclude that they had been lost to the extent that they could not be found. Thus, there is a record in which Ms. Tucker indicated that some records were destroyed, but there was no information from the Commissioner as to which records were destroyed and which were merely missing.

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[5] The full record of testimony on this subject should be analyzed, with due regard to the sequence and timing of the evidence presented by the Commissioner. See testimony of Sharon Needham (Tr. 29-39) and Simonne Tucker (Tr. 40-64) on March 12, 1980, Ms. Tucker again (Tr. 810-817), Delores Reardon (Tr. 818-838), Ms. Tucker again (Tr. 838-845) and again (Tr. 895-901), Ms. Reardon again (Tr. 902-903), Joseph Turner (Tr. 904-911), and Agent Henry Purk (Tr. 966-1014) on March 14, 1980, and attorney Paul Voelker (Tr. 1080-1105) and attorneys William Falk and Henry Schafer (Tr. 1117-1133) on July 22, 1980.

The circumstances of the destruction suggest that Rule 1004 of the Federal Rules of Evidence should not have been applied. Ms. Tucker positively identified Agent Purk as the person who told her that the records were no longer needed because Mr. Gryder had died (Tr. 50-52, 59-60).[4] It then took two days for Mr. Purk to assume the stand, and on as important a matter as the destruction of records, he was not even asked on direct examination about the conversation with Ms. Tucker. When he was asked about it on cross-examination, he did not deny that he had told Ms. Tucker that they could be destroyed, but merely said "I have no recollection of that" (Tr. 994). It is highly significant that he was sitting in the court room when Ms. Tucker testified, and he had easy access to counsel for the Commissioner; yet, there was not one question asked of Ms. Tucker concerning her eye-witness courtroom identification of Mr. Purk. Surely if Mr. Purk had disputed the fact that he told Ms. Tucker to destroy the records, he would have said something to counsel, and she would have been questioned further as to the accuracy of her identification of Mr. Purk. We suggest that the Commissioner was willing to accept Ms. Tucker's testimony as to the responsibility of Mr. Purk for the destruction of whatever records were destroyed until the government began to realize the impact upon its position in this case.

But Mr. Purk created greater confusion when he testified on direct examination that he extracted all of the necessary records from those in storage and delivered them to Mr. Voelker (Tr. 969-973). This then created the impression that the records somehow got lost, and presumably the Commissioner was willing to rely upon the provisions of Rule 1004 concerning lost documents.

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[4] The Tax Court and Court of Appeals opinions did not even comment upon this very significant and crucial evidence.

Nothing further was said by the Commissioner until the trial was resumed four months later. Then, his position shifted again because Mr. Voelker testified that although he had the records, he returned some to the file room (Tr. 1084). Presumably the official position was shifting so as to contend that the records were destroyed as a result of the Purk-Tucker conversation. Mr. Voelker testified that he retained some documents and turned them over to Mr. Falk (new counsel for the Commissioner) (Tr. 1085), who acknowledged receiving some papers and making a search for others (Tr. 1117-1133).[7] Mr. Falk and Mr. Schafer found some additional documents (of no particular importance to this case), but the crucial documents did not appear at trial.

The end result was that the matter of the whereabouts or the loss or destruction of the records was so hopelessly confused that the Commissioner should not have been permitted to profit from the incompetencies within his agency. Furthermore, there never was an explanation as to which records were destroyed and which were not, or why some books were found by Mr. Falk and Mr. Schafer, or why some books for the year 1967 appeared and others did not.

Under the circumstances, we believe that it was grossly improper and highly prejudicial to attempt to use secondary evidence. In *Consolidated Coke Co.* v. *Commissioner,* 25 B.T.A. 345, 358 (1932), affd. 70 F. 2d 446, 448 (3rd Cir. 1934), the Court commented on inadmissibility of documents where the originals had been destroyed by an attorney:

> ". . .To permit a party to litigation to deliberately destroy evidence and then in his own behalf introduce a copy would obviously subvert the basic principles of the best evidence rule and promote chicanery. . . .

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[7] The record is not clear as to whether all the records retained by Mr. Voelker were still available at the trial.

> "We have been able to find no case like this in the books, but the unmistakable implications support the disregard of secondary evidence introduced by a party in his own behalf after he has voluntarily and deliberately destroyed the best evidence during the pendency of the controversy. The discretion of the court to receive such evidence when the original has been involuntarily or inadvertently destroyed if satisfied of its reliability cannot reach the present situation."

Furthermore, the evidence offered here did not even reach the dignity of secondary evidence. Primarily it consisted of prior testimony at the criminal trial of Mr. Blum and Mrs. Hoch (who because of the passage of time had no present recollections) and testimony by Mr. Purk (who could not remember telling Ms. Tucker in 1979 to destroy the documents, but miraculously had positive recall of contents of documents which he had examined at or prior to the criminal trial in 1975). The transcripts of Mr. Blum's (such as Tr. 1293 ff) and Mrs. Hoch's (such as Tr. 1766 ff) testimony at the criminal trial did not refresh their recollections, and under Rule 801(c), their prior testimony was hearsay not admissible under any of the exceptions to the hearsay rule. They fall within the definition of Rule 804(a)(3) of an unavailable witness because of their lack of memory of the subject matter of earlier testimony; but such former testimony would not qualify under the hearsay exception of Rule 804(b)(1) because, although it was taken when they were witnesses at a different proceeding, the testimony was now being offered against wife who was not a party to that proceeding and therefore did not have an opportunity to develop testimony by cross-examination. Similarly, wife had no opportunity for cross-examination of Mr. Purk at the criminal trial. And finally, as the Tax Court recognized (Tr. 1716-1724), the issues and burdens at the criminal trial were different from those at the Tax Court trial.

The Court of Appeals acknowledged that the transcripts from the criminal trial were hearsay, but said (at p. 338):

"Nonetheless, the Tax Court did not err in admitting it. Neither the Commissioner nor the taxpayers brought the hearsay problem clearly to the court's attention." This statement is in direct conflict with the record in the Tax Court.

Implicit throughout the entire discussion in the Tax Court concerning the missing records and the use of secondary evidence, whether in chambers or in the courtroom on the record, was the recognition that the transcripts of the criminal trial were hearsay. That was the main thrust of petitioners' argument and discussions with the Tax Court, particularly with reference to Mrs. Gryder who was not a party to the criminal proceedings which generated the transcripts.

That hearsay was a basis for the objection to the Commissioner's use of the transcripts clearly appears in the record at the first occasion of its use by the Commissioner. At Tr. 466, petitioners obviously reminded the Tax Court of earlier discussions regarding the hearsay objection; there is a specific mention of Rule 804(b)(1) of the Federal Rules of Evidence. Certainly the Court understood in the discussion through Tr. 471 that the objection related to what Rule 804(b)(1) relates to — hearsay and hearsay exceptions. When the Tax Court finally ruled on the admissibility of the transcripts as secondary evidence, during the crucial testimony of Mr. Blum, the long discussion which ensued (Tr. 1292-1338) establishes that appellants were objecting not only on the issues under Rule 1004 but also on the issues within the framework of Article VIII of the Federal Rules of Evidence — hearsay.

Finally, it should be noted that the hearsay issue was directly presented to the Tax Court in the main brief submitted by petitioners after trial and before decision by the Tax Court:

> "The transcripts of Mr. Blum's and Mrs. Hoch's testimony at the criminal trial did not refresh their recollections, and under Rule 801 (c), their prior testimony would be *hearsay* not admissible under any of the exceptions to the hearsay rule." [Emphasis added.]

There should have been no doubt in the mind of the Tax Court that the hearsay objection was an issue.

It was grossly unfair to deprive petitioners of the ability to defend themselves, on issues in which they had the burden of proof, because of the disappearance and/or destruction of crucial documents by the Commissioner. It was particularly unfair to Mrs. Gryder who was not a party to the earlier criminal proceedings, in which the issues were different, especially after the death of her husband who was the only person who could explain the factual matters involved. Due process required more than the procedures in this case.

For these reasons, we believe that certiorari should be granted as to this Question.[8]

III.

Innocent spouse

26 U.S.C. § 6013(e) provides relief to a spouse from tax liability in certain cases, setting out three conditions. The first is that there be a joint return and a substantial (25%) omission from gross income of an amount attributable to the other

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[8] We recognize that the meager treatment given to this issue (as well as other issues) by the Court of Appeals may, at first glance, suggest that the opinion below will be of little precedential value, and that the lack of citation of authorities or factual background avoids conflict with decisions of this Court or other Courts of Appeals, thereby obviating consideration of the traditional grounds for review on certiorari suggested in Rule 17.1 of this Court. Nevertheless, we seriously contend that certiorari should be granted because the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Furthermore, we submit that precedential impact may be generated by reference to the greater detail in the reported Tax Court decision (T.C. Memo. 1981-406), now affirmed by the Court of Appeals.

spouse.[9] The second condition is that wife establish that when she signed the return, she did not know of, and had no reason to know of, the omission. The third condition is that it would be inequitable to hold her responsible for the tax where there is no significant direct or indirect benefit to her. Petitioners believe that the evidence in this case established clearly that wife was an innocent spouse entitled to the relief provided by § 6013(e), and the Tax Court and Court of Appeals erred in ruling otherwise.

Wife acknowledged that she was aware that her husband was engaged in business, but, as corroborated by the bookkeeper Mrs. Hoch (Tr. 2000), she performed no function connected with the business (Tr. 2344-2347). As a matter of fact, there was a personal relationship between Mr. Gryder and Mrs. Hoch, which gave Mrs. Gryder even more reason to stay away from the business (Tr. 2021, 2345-2346). Although there were a few rent checks endorsed by her, she explained that she put the checks in the bank or her husband cashed them (Tr. 2360-2361). She had nothing to do with other real estate except to sign (without question) documents presented by her husband (Tr. 2364-2371). She had nothing to do with the preparation of the tax returns or the furnishing of information to the tax preparer (Tr. 2347-2349, 2362, 2423), and this testimony was corroborated by the accountant, Mr. Blum, who never met her until the criminal trial (Tr. 1504).

The law concerning an innocent spouse is discussed in *Henry M. Rodney,* 53 T.C. 287 (1969),[10] which, although decided

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[9] We will assume for the sake of discussion that the 25% omission exists, although we deny that it does. Without such omission, the innocent spouse issue would be moot, because the statute of limitations would be a complete defense to wife.

[10] The *Rodney* case is of interest also for its discussions of the statute of limitations as to wife (53 T.C., at 311).

before the adoption of § 6013(e), nevertheless is applicable to the guidelines established by that statute. A leading case on this subject is *Sanders* v. *United States*, 509 F. 2d 162 (5th Cir. 1975), and see particularly its discussion of the "reason to know" condition of § 6013(e)(1)(B) and the "significant benefit" condition of § 6013(e)(1)(C). See also Annotation, 31 A.L.R. Fed. 14.

The Tax Court, affirmed without discussion by the Court of Appeals, faulted wife for being unable to show that she had no reason to know of the omission of gross income for years which were ten years before the trial, suggesting that wife had "reason to know" because she knew work was being done at the High Hill residence and that household expenses were not paid from a home bank account. However, there was no evidence to indicate that she had any knowledge as to the tax consequences or how the transactions were treated on the books and records or in tax returns; in fact, the evidence was clear that she knew nothing of any of the bookkeeping or tax and accounting aspects. Just because household bills were not paid from a joint checking account does not mean that wife was charged with knowledge that they were being handled in an improper way, especially where it was clear that her husband handled all transactions.

Without citation of authority, the Tax Court stated that "had she carefully reviewed the returns, she would have known of" the omissions and questioned the source of funds. Such a holding goes beyond the standards of *Sanders* v. *United States, supra,* which fully analyzes (509 F.2d at 165-170) the rules applicable to the lack of knowledge or reason to know test of § 6013(e)(1)(B). Petitioners believe that the factors are stronger in the instant case to protect Mrs. Gryder as an innocent spouse. The pictures in evidence (Exh. 246) showed that the High Hill property was not a lavish mansion; there was merely a replacement of the former residence of the parties (albeit of a country atmosphere rather than city living). She never participated in financial or business affairs. She had no knowledge of what her

husband was doing and was not in position to obtain the information. Aside from the personal reasons she had for not going to the place of business resulting from her bad relationship with the bookkeeper, she was just not furnished with any information by husband. As a reasonably prudent person under the facts of this case, it is clear that Mrs. Gryder did not know and had no reason to know of the omissions from income by her husband. If she had "reason to know", then we cannot conceive of a factual situation in which there could be an innocent spouse (other than perhaps one who is mentally incompetent).

Petitioners believe the Court of Appeals also erred in holding that wife "received a significant benefit" from the omissions, and is therefore not an innocent spouse under § 6013(e)(1)(C), basing its ruling upon the fact that several parcels of real estate came to wife after the death of husband in December, 1975, long after the tax years involved. As the Tax Court found, husband and wife purchased their residence at High Hill as they were selling their former residence on Orchard Drive. Other property acquired included an additional 40 acres at High Hill for a down payment of $10,250.00, the Frey property for $4,200.00, the McGraw property for $700.00, the Weekley property for $9,400.00, the Fitzwilliam property in O'Fallon for a down payment of $10,000.00, and the Moore property for no down payment. Some of this property had been received as down payments on automobiles sold by DeVille Motors, because Mr. Gryder had been under the impression that corporate ownership of real estate created problems (Cr. Tr. 2345-2346).

The receipt of these properties by wife after husband's death should not bar wife from the protection of § 6013(e). As to the High Hill property (even including the improvements which were added, and apparently paid for by the business, at husband's direction), wife was being given a replacement residence, similar to that received by many wives. The property which was placed in her name jointly with husband involved transactions

in which husband believed he was acting in the interests of the company. Wife received no present benefit from those assets as a result of the transactions. Her only benefit was from the circumstance that she survived her husband, and by operation of law she became the owner, either as beneficiary of his estate or as a surviving tenant by the entireties. There was no benefit received at the time because the jointly held property could just as easily have never become hers, if husband had been the survivor or if he had requested her to sign transfer documents, which she would have done without question according to her practice in all business transactions requiring her signature.

Had this case not been long delayed by the Commissioner, husband would not only have been available to testify, but there would have been no "benefit" to wife; her benefit, if any, came by operation of law as a result of surviving her husband and such inheritance is merely the equivalent of support for her after his death, similar to what most husbands provide in the way of support after their death. Wife did not receive expensive gifts, such as furs, jewelry, automobiles, travel, etc. What she received was no different from, but less than, the $155,000.00 which the wife, in *Terzian* v. *Commissioner*, 72 T.C. 1164 (1979), received in her divorce settlement for future support. What Mrs. Gryder received as a result of the death of Mr. Gryder was the equivalent of support that she would need for the rest of her life after Mr. Gryder's death. At this late date, it would be inequitable to hold her responsible for her husband's tax liabilities.

We have been unable to find any cases involving factual settings identical to the instant case in which benefit to the wife came years after the tax years involved and as a result of the laws of inheritance. See, however, footnote 16 of *Sanders* v. *United States*, 509 F. 2d at 171, where the receipt of $145,000.00 in insurance proceeds and the additional proceeds from the sale of property did not bar the widowed Mrs. Sanders from the protection of § 6013(e)(1)(C). Mrs. Gryder is entitled to the same statutory protection.

The Court of Appeals opinion cited Senate Report No. 1537 to hold that Mrs. Gryder received significant benefits, years after the tax years involved, resulting only from inheritance and survivorship. It is true that the Senate Report does refer to inherited property, but it also refers to life insurance proceeds; in that regard, the Senate Report did not prohibit the widow in *Sanders* v. *United States* from innocent spouse status because she received life insurance proceeds.

We respectfully suggest that the significant benefit condition of 26 U.S.C. § 6013(e)(1)(C) is an issue of exceptional public importance which, in the context of this case, had not previously been decided by any Court of Appeals. This case clearly presents the issue as to whether property received by wife long after the alleged fraudulent conduct by her husband and only as a result of his death and operation of the law of inheritance could be considered a significant benefit. In this respect, there appears to be conflict with the decision involving $155,000.00 given to the wife in *Terzian* v. *Commissioner*, and the $145,000.00 insurance proceeds in *Sanders* v. *United States*.

We believe the innocent spouse issues presented by this petition are of exceptional public importance and likely to recur often. They are issues which should be determined by this Court, in the light of *Terzian* and *Sanders*.

We respectfully submit that certiorari should be granted as to this Question.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1597

Estate of Cordial Gryder, Deceased, Pansy Gryder, Executrix, and Pansy Gryder,

Appellants,

v.

Commissioner of Internal Revenue,

Appellee.

On Appeal from the United States Tax Court.

Submitted: January 12, 1983

Filed: April 29, 1983

Before BRIGHT, ARNOLD, and JOHN R. GIBSON, Circuit Judges.

ARNOLD, Circuit Judge.

This is an appeal from the judgment of the United States Tax Court[1] against a widow, Pansy Gryder, and the estate of her late husband, Cordial Gryder. The taxpayers contend that (1) the Tax Court erred in allowing the introduction of secondary evidence of corporate records, (2) there was insufficient evidence to sustain the Tax Court's finding of fraud, (3) the assessments were barred by the statute of limitations, and (4) Pansy Gryder was an innocent spouse. For the reasons set forth below, we affirm.

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[1]The Hon. Irene F. Scott, Judge.

I.

Cordial Gryder, a Missouri resident, owned and managed a car dealership, DeVille Motors, Inc. Cordial paid many of his and Pansy's personal expenses with checks drawn on various corporate accounts. For example, checks drawn on DeVille were used to pay the Gryders' personal utility bills, to pay for improvements to their home, to make mortgage payments on real property they owned, and to purchase stocks and other personal property in their names and for their personal use. The Gryders failed to report these benefits as income on their joint tax returns, and the corporation deducted many of the payments as business expenses. The Gryders also failed to report certain other income, including dividends, interest, and rent.

In 1975 Cordial was convicted in federal district court of filing false tax returns for the years 1967 through 1971. While the conviction was on appeal to this Court, Cordial died, and we vacated the conviction and dismissed the case as moot. Pansy took most of the property by survivorship, and she succeeded to the small amount of property in the probate estate as sole legatee. She is the executrix.

On February 5, 1976, the Commissioner assessed more than $100,000 in deficiencies and fraud penalties[2] against Cordial and Pansy on their joint income tax returns for 1967 through 1971. On July 21, 1976, the Commissioner assessed more than $160,000 in deficiencies and fraud penalties against Cordial as the transferee of DeVille Motors on the corporate tax returns for 1967 through 1970. Ultimately, the Tax Court upheld the Commissioner's determination, almost in full. The Tax Court found that the penalty assessments were justified because Cordial had fraudulent intent, and that although the Commissioner had failed to show that Pansy had any fraudulent intent, she

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[2]The fraud penalties were assessed under 26 U.S.C. §6653(b) (1976).

was not an innocent spouse under 26 U.S.C. §6013(e) (1976), because she should have known that there were omissions of income from the joint returns and she benefitted from the omissions.[3]

II.

At trial, the Commissioner was unable to produce the originals of many corporate records, including journals and check-stub books. These records were destroyed by employees of the Internal Revenue Service after Cordial's criminal trial. The Tax Court's finding that these documents were destroyed negligently but not in bad faith is not clearly erroneous; thus, the Commissioner could seek to prove their contents by secondary evidence. Fed. R. Evid. 1004(1).

The Commissioner partially relied on portions of the transcript of the criminal trial in which witnesses had testified about the contents of some of the destroyed records. This was proper secondary evidence under the Federal Rules. *E.g., United States v. Gerhart,* 538 F.2d 807, 809 (8th Cir. 1976). However, the transcript remained heresay even though the requirements of Rule 1004 had been met. Nonetheless, the Tax Court did not err in admitting it. Neither the Commissioner nor the taxpayers brought the hearsay problem clearly to the court's attention. Moreover, the parties stipulated that two important witnesses' testimony about the contents of certain records would be the same as their testimony at the criminal trial. Finally, we believe that the evidence would have been admissible in any event either as recorded recollection, Fed. R. Evid. 803(5), or under the "catch-all" exceptions, Fed. R. Evid. 803(24), 804(b) (5).

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[3]Thus, Cordial's estate was liable for all the deficiencies and penalties, while Pansy was jointly and severally liable only for the deficiencies on the individual joint returns.

III.

The taxpayers argue that the evidence is insufficient to show fraud and that the amount of the deficiencies determined by the Tax Court is too high. We disagree. The Tax Court was the trier of fact, charged with judging the credibility of the witnesses, and it did not believe the taxpayers' evidence. We cannot say that its findings were clearly erroneous.

IV.

The normal period of limitations for the assessment of taxes is three years after the return was filed. 26 U.S.C. §6501(a) (1976). Under 26 U.S.C. §6501(c) (1) (1976), however, when fraud is shown, "the tax may be assessed . . . at any time." Thus, the Tax Court's finding that the individual joint returns and the corporate returns were fraudulent lifted the bar of the statute of limitations for 1967 through 1970[4] with respect to each case.[5] The taxpayers argue that the three-year statute should have applied because the Commissioner's investigation was complete by late 1973, and that his delay in issuing the notices of deficiency worked an unconscionable hardship on the taxpayers, since Cordial was dead and many original records were unavailable. This contention is wholly without merit; the language of §6501(c) (1) is clear.[6]

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[4]The assessment regarding the individual return for 1971 was within the three-year period of limitations, since that return was filed on February 20, 1973.

[5]The Tax Court found it unnecessary to determine whether 26 U.S.C. §6501(e) (1) (1976, which provides for a six-year period of limitation for returns which omit properly includible gross income in excess of 25% of that reported, applied. We do not decide the question, either.

[6]This is not a case in which the taxpayer filed an amended, non-fraudulent return. *Compare Dowell v. Comm'r of Internal Revenue*, 614 F.2d 1263 (10th Cir. 1980) (holding that the Commissioner must

V.

The taxpayers argue that the Tax Court erred in holding that Pansy was not an innocent spouse under 26 U.S.C. §6013(e) (1976), so as to be relieved of joint liability for the deficiencies.[7] Pansy had the burden of proving that she had no reason to know of the omitted income, and we cannot say that the Tax Court's determination that she did not meet this burden is clearly erroneous. We also find no fault with the Tax Court's decision that it would not be inequitable to hold Pansy liable for the deficiency. The taxpayers' argument that she did not receive a significant benefit from the items omitted from gross income is without merit. She received title to a considerable amount of property purchased with funds from DeVille, which was not reported as income. It does not matter that she received full title by devise and survivorship. See S. Rep. No. 1537, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 6089, 6092.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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assess the deficiency with respect to a fraudulent return within three years after an amended, nonfraudulent return is filed), *with Badaracco v. Comm'r of Internal Revenue*, 693 F.2d 298 (3d Cir. 1982), *petition for cert. filed*, 51 U.S.L. Week 3669 (U.S. Feb. 24, 1983) (No. 82-1453) *(contra)*.

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[7]Since Pansy was found to be not guilty of fraud, she was not liable for the fraud penalties. 26 U.S.C. §6653(b) (1976).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

82-1597

Estate of Cordial Gryder, Deceased, Pansy Gryder, Executrix, and Pansy Gryder,

Appellants,

vs.

Commissioner of Internal Revenue,

Appellee.

September Term 1982

Appeal from the United States Tax Court

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

June 9, 1983

APPENDIX C

T. C. Memo. 1981-466

UNITED STATES TAX COURT

Estate of Cordial Gryder, Deceased, Pansy Gryder, Executrix, and Pansy Gryder,

Petitioners

v.

Commissioner of Internal Revenue,

Respondent

Estate of Cordial Gryder, Deceased, Pansy Gryder, Executrix,

Petitioner

v.

Commissioner of Internal Revenue,

Respondent.

Docket Nos. 3785-76,
9429-76.

Filed August 27, 1981.

Irl B. Baris, for the petitioners.

William J. Falk and *Henry T. Schafer,* for the respondent.

Memorandum Findings of Fact and Opinion

SCOTT, *Judge:* Respondent determined deficiencies in the income tax and additions to tax of Cordial Gryder (now deceased) and Pansy Gryder for the years and in the amounts as follows:

Calendar Year	Deficiencies in Income Tax	Additions to Tax I.R.C. 1954 Section 6653(b)[1]
Dec. 31, 1967	$ 3,669.74	$ 1,834.87
Dec. 31, 1968	46,512,95	23,256.48
Dec. 31, 1969	3,694.54	1,847.27
Dec. 31, 1970	12,724.06	6,362.03
Dec. 31, 1971	3,839.13	4,289.07

Respondent determined that Cordial D. Gryder (now deceased) is liable as transferee of DeVille Motors, Inc. for income taxes and additions to tax of DeVille Motors, Inc. for the years and in the amounts as follows:

Calendar Year	Deficiencies in Income Tax	Additions to Tax I.R.C. 1954 Section 6653(b)
Dec. 31, 1967	$25,297	$12,649
Dec. 31, 1968	35,529	17,765
Dec. 31, 1969	12,873	6,437
Dec. 31, 1970	36,703	19,491

The issues for decision are:

(1) Whether the income tax returns filed by Cordial D. Gryder and Pansy M. Gryder for each of the years 1967 through 1970 were false or fraudulent with intent to evade tax so that the statute of limitations does not bar the assessment and collection of taxes for these years or, in the alternative as to the years 1969 and 1970, whether there was an omission of income on the joint returns filed by Cordial D. and Pansy M. Gryder of more than 25 percent of the income reported so that the statue of limitations provided for in section 6501(e) (1) (A) is applicable.

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[1]Unless otherwise noted, all section references are to the Internal Revenue Code of 1954, as amended and in effect during the years here in issue.

(2) What is the amount of the underpayment of tax by Cordial and Pansy Gryder for each of the years 1967 through 1971 and whether any part of the underpayment for each of those years was due to the fraud of Cordial Gryder or to the fraud of Pansy Gryder so as to cause the additons to tax under section 6653(b) to be due by either or both of them.

(3) Whether the returns filed by DeVille Motors, Inc. for each of the years 1967 through 1970 were false or fraudulent with intent to evade tax so that assessment of tax against Cordial Gryder as transferee of DeVille Motors, Inc. was not barred by the statute of limitations at the time of the issuance of the notice of transferee liability to Cordial Gryder.

(4) What is the amount of the underpayment of tax by DeVille Motors, Inc. for each of the years 1967 through 1970 and whether any part of the underpayment of tax for each of those years is due to fraud so as to cause the additions to tax under section 6653(b) to be due by the corporation.

(5) Whether the Estate of Cordial Gryder, Deceased, Pansy Gryder, Executrix, is liable as a transferee for any deficiencies and additions to tax due by DeVille Motors, Inc. for the calendar years 1967 through 1970.

(6) Whether Pansy Gryder is an innocent spouse within the meaning of section 6013(e) and therefore should be relieved of liability with respect to omissions of income from the joint returns she filed with her husband Cordial Gryder.

Findings of Fact

Some of the facts have been stipulated and are found accordingly.

During the years 1967 through 1971 Cordial Gryder and Pansy Gryder, husband and wife, filed joint individual income tax returns. At the time of the filing of the petition in this case Cor-

dial Gryder was deceased and Pansy Gryder,[2] who resided in High Hill, Missouri, was the executrix of his estate.

* * * * * * *

At the time of the trial of this case, Pansy Gryder was the owner of both the 40-acre and the 57-acre parcel of property at High Hill, Missouri. She still owned approximately one-half of the O'Fallon property, the other half of that property having been condemned by the Missouri State Highway Department in 1978. Pansy Gryder had received between $70,000 and $78,000 from the State of Missouri for the portion of the O'Fallon property condemned in 1978. At the time of the trial of this case, Pansy Gryder owned the Fredericktown, Missouri, property which Cordial Gryder had acquired from Eldred McGraw in 1967, and the Woodland Park Harbor property which had been acquired by Cordial Gryder from Mr. Frey and Mr. Beights. Also, at the time of the trial of this case, Pansy Gryder owned the Lake of the Ozarks Property, sometimes referred to as Horseshoe Bend, which had been acquired by Mr. Gryder from Robert Moore. All of the real property owned by Cordial Gryder at the time of his death, except one parcel, was held in the joint names of Pansy and Cordial Gryder.

After Cordial Gryder died in 1975, Pansy Gryder took over the ownership and management of Gryder Motors and was operating this business at the time of the trial of this case. After Cordial Gryder's death, Pansy Gryder also became the owner of the Coronado boat and the three tractors which had been owned by Cordial Gryder. Under the Last Will and Testament of Cordial Gryder, Pansy Gryder was his sole legatee and divisee and as such received all the property he owned at the time of his death.

* * * * * * *

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[2]At the time of the trial of this case Pansy Gryder had remarried. However, she was referred to during the trial as Pansy Gryder or Mrs. Gryder and will be so referred to herein.

Ultimate Findings of Fact

1. The Federal income tax returns filed by Cordial and Pansy Gryder for each of the years 1967, 1968, 1969, 1970 and 1971 were false and fraudulent with intent to evade tax.

2. The federal income tax returns filed by DeVille for each of the years 1967, 1968, 1969 and 1970 were false and fraudulent with intent to evade tax.

3. There is an underpayment of tax by Cordial and Pansy Gryder for each of the calendar years 1967, 1968, 1969, 1970 and 1971, and a part of the underpayment for each of these years is due to the fraud of Cordial Gryder.

4. Repondent has failed to show by clear and convincing evidence that any part of the underpayment of tax for any of the years 1967, 1968, 1969, 1970 and 1971 was due to the personal fraud of Pansy Gryder.

5. Pansy Gryder reasonably should have known that there were omissions of income from the Federal income tax returns which she filed jointly with Cordial Gryder for each of the years 1967, 1968, 1969, 1970 and 1971.

6. Pansy Gryder significantly benefited directly from the items omitted from the gross income on the joint income tax returns filed by Cordial and Pansy Gryder for the years 1967, 1968, 1969 and 1970.

7. There is an underpayment of tax in each of the years 1967, 1968, 1969 and 1970 by DeVille, a part of which underpayment is due to fraud.

8. DeVille was rendered insolvent beginning in the year 1968 by the distributions made without consideration to Cordial Gryder during the years 1967, 1968, 1969 and 1970.

Opinion

Each of the parties in this case argued at length in the briefs as to the correctness of the ruling made by the Court at the trial with respect to the acceptance of secondary evidence. Therefore, we will discuss in more detail than at the trial the basis of that ruling before reaching any of the substantive issues in this case.

Respondent consumed several days of trial time with the testimony of witnesses explaining the reason for the unavailability of the originals of certain records. Without going into detail with respect to the testimony of each witness, we conclude that this voluminous testimony established the following facts.

At the conclusion of the criminal trial of *United States v. Cordial D. Gryder, supra,* which was held from May 5, 1975 through June 2, 1975, many of the original records of Cordial Gryder and of DeVille were exhibits in that case and other of those records were in the possession of the United States Attorney. When the criminal case was appealed to the Eighth Circuit, the documents which had been received in evidence were sent to the Circuit Court. When the case was remanded to the District Court with directions to enter a verdict of acquittal because of the death of Mr. Gryder, these exhibits were returned to the United States Attorney. After receiving the exhibits the United States Attorney transferred to the Intelligence Division of the Internal Revenue Service all of the original records of DeVille and of Mr. Gryder which had at any time been in the possession of the United States Attorney, including both those which had been introduced in evidence in the criminal case and those which had not. These documents were contained in a large number of boxes which were placed in the security storage room of the Criminal Investigation Division of the Internal Revenue Service. When an attorney in respondent's St. Louis office commenced work on the instant case, he and the revenue agent who was assisting him were given access to these boxes. At that time

the revenue agent saw in these boxes the DeVille disbursements, sales and receipts journals for 1968, 1969 and 1970, canceled checks and check stubs of DeVille, third party documents, affidavits, memoranda of interviews, bank statements, agents' work papers, loan ledgers and certain papers concerning Gryder Motors. The revenue agent, at the direction of the attorney handling the case for respondent, withdrew all the documents which he and the attorney considered to relate to the fraud issues involved in the above-entitled case. These documents were retained in the office of the attorney for respondent from the time they were withdrawn until March 1979 after the above-entitled case had been continued from the March 1979 St. Louis trial calendar. After the case was continued, respondent's attorney returned approximately two-thirds of the documents which had been withdrawn from the boxes in the Criminal Investigation Division storeroom to that storeroom. He retained the balance of the documents in his office. In October 1979 the attorney who had been handling this case turned over the documents which were in his office to the attorneys presently representing respondent. After the attorneys presently handling the case reviewed the files that had been turned over to them, they discovered that these files did not include the 1968, 1969 and 1970 disbursements, sales and receipts journals of DeVille, the check stub book of DeVille, some signature cards, some financial statements which Cordial Gryder had submitted to Associates Financial Service Co. and Colonial Bank, some materials related to Gryder Motors, the work papers of the C.P.A. for Gryder Motors, a number of bank statements and deposit slips and most of the supporting schedules and work papers of the revenue agents and special agents which had been prepared in connection with the criminal case. When inquiry was made with respect to these files late in 1979 or early in 1980, the attorneys were informed that in accordance with a reorganization of the file room, the files had been transferred from the Criminal Investigation Division storeroom to a central file storeroom which was responsible for the storage and

maintenance of all Internal Revenue Service files in the St. Louis region. When further inquiry was made, respondent's attorneys were informed that the person in charge of the central file room, upon learning that the special agent's report had been retired to the Federal Records Center, directed that all the boxes containing material with respect to Mr. Gryder's tax liability for the years 1967 through 1971, the tax liability of DeVille for the years 1967 through 1970, and the tax liability of Gryder be hauled out and burned.

The required procedure before destruction of a file in the St. Louis region was that the Appeals Office of that region, the Examination Division of that region and the District Counsel's Office of that region be notified of the proposal to destroy the documents. If any objections were made by a responsible person from any of these offices to the destruction of a file, that file would not be destroyed. The person in charge of the central file storeroom to which the Gryder and DeVille files had been sent in late 1979 was unaware of the procedure required to be followed before a file was destroyed. She addressed a memorandum to the chief of the Criminal Investigation Division requesting authority to destroy the work papers and other documents contained in the boxes stored in the central file storeroom she supervised which were marked with the name of either DeVille or Cordial Gryder. By happenstance, the chief of the division was on leave the day the memorandum requesting authority to destroy the files was received and a secretary returned to the person in charge of the central file room the memorandum requesting permission to destroy the records with the statement that the destruction was approved by the assistant chief of the Criminal Investigation Division. Shortly thereafter the records were hauled away and on December 12, 1979, were burned.

Many of the records contained in these boxes were copies of bank records and other items. Respondent's attorneys called various bank officials and had the bank records produced and

copies of those records were received in evidence as records kept in the normal course of business by banks. A thorough search was made of all respondent's offices in the St. Louis region and the offices of the United States Attorney in St. Louis with the result that some of the other original records not turned over to the attorneys representing respondent in this case were discovered. Many of the work papers of the agents were reconstructed from evidence available to respondent and introduced at the trial of this case. However, the disbursements, sales and receipts journals of DeVille for the years 1968, 1969 and 1970 were not located, the originals of certain canceled checks were not located and the original check stub book was not located, as well as certain other documents. Copies of many of these documents were located in the exhibits which had been introduced at the criminal trial and copies of other documents were located by various witnesses who testified in this case. Much of the secondary evidence received at the trial of this case were these documents. The balance of the secondary evidence received with respect to the records of DeVille was the transcript of testimony at the criminal trial. At that trial witnesses had read into the record information from DeVille's various journals. The same witnesses were called to testify at the trial of the instant case, but were unable to remember the figures to which they had testified in the criminal trial when they had the records before them. Each of these witnesses testified that he or she had truthfully testified at the criminal trial. These transcripts were received as secondary evidence of the contents of the records of DeVille.

Rule 1004 of the Federal Rules of Evidence, which governs the admissibility of evidence by this Court, provides as follows:

> Rule 1004. Admissibility of Other Evidence of Contents
>
> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if —

(1) *Originals lost or destroyed.* — All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) *Original not obtainable.* — No original can be obtained by any available judicial process or procedure; * * *

As was stated by the Court at the trial, we conclude that originals of the DeVille journals for the years 1968, 1969 and 1970, certain canceled checks and check stubs, bank statements and loan ledgers which were in the boxes in the central files storeroom of the Internal Revenue Service have been destroyed and that these documents were not destroyed in bad faith by agents or respondent but merely through inadvertence or negligence. Since we find from the evidence offered at the trial with respect to the destruction of records that the destruction of the DeVille and Gryder original records by respondent's agents was not in bad faith, we conclude that the ruling at the trial receiving in evidence the secondary evidence of these records was proper. For this reason we included in our findings of fact some findings based on this secondary evidence.

It should, however, be pointed out that the evidence received at the trial of this case, other than the secondary evidence referred to above, was sufficient to establish that the tax returns of Cordial and Pansy Gryder for each of the years 1967, 1968, 1969, 1970 and 1971 were false and fraudulent due to the fraud of Cordial Gryder. The basis of this conclusion will be discussed hereinafter in the discussion of the substantive issues in this case. Therefore, the admission of the secondary evidence has little, if any, bearing on our conclusion with respect to the case insofar as it involves the tax liabilities of Cordial and Pansy Gryder for the years 1967, 1968, 1969, 1970 and 1971.

There is a substantial amount of evidence other than the secondary evidence supporting the conclusion that the returns of DeVille for each of the years 1967, 1968, 1969 and 1970 were false and fraudulent. The evidence that is missing with respect

to DeVille, without consideration of the secondary evidence, is how some of the payments on behalf of Cordial Gryder by DeVille were shown on the books of DeVille and treated on DeVille's tax returns for each of the years here in issue. The tax returns of DeVille are in evidence and there is some evidence in the record, aside from the secondary evidence, as to the handling of personal liabilities of Cordial Gryder paid by DeVille in computing DeVille's taxable income on its returns. However, we consider it unnecessary to determine whether this evidence alone would be clear and convincing evidence of fraud on the part of DeVille since we conclude that our ruling at the trial receiving secondary evidence with respect to the contents of the documents which had been destroyed was proper.

The substantive issues in this case are primarily factual. From the facts in this case it is clear that the returns of Cordial and Pansy Gryder for each of the years 1967 through 1970 were false and fraudulent with intent to evade tax. For this reason the assessment and collection of deficiencies is not barred by the statute of limitations for any of the years here in issue (section 6501(c) (1)).[3] It is therefore unnecessary for us to determine whether, in accordance with respondent's alternative position, certain of the years would be open under section 6501(e).

* * * * * * * *

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[3]Section 6501(c) (1) provides are follows:

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

* * *

(c) Exceptions —

(1) False return. — In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

On the basis of the evidence in this case, we conclude that the assessment of deficiencies against Cordial and Pansy Gryder and against DeVille for the years 1967, 1968, 1969 and 1970 is not barred by the statute of limitation.

It is clear from the record in this case that there is an underpayment of tax by Cordial and Pansy Gryder for each of the years 1967 through 1970 and an underpayment of tax by DeVille for each of the years 1967 through 1970. For the reasons we discused above, it is equally clear that a part of the underpayment of tax by Cordial Gryder in each of the years 1967 through 1970 and a part of the underpayment of tax by DeVille in each of these years was due to fraud so that respondent properly determined the additions to tax under section 6653(b) against them. However, the record does not contain clear and convincing evidence that a part of the underpayment of tax by Cordial and Pansy Gryder for each of the years 1967 through 1970 was due to the fraud of Pansy Gryder. Section 6653(b)' provides that if any part of an underpayment of tax required to be shown on the return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. This section further provides that in the case of a joint return under section 6013 "this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse."

The record here shows that the unreported AT&T dividends were with respect to stock initally purchased by Pansy Gryder and that she was aware of the interest from the certificates of deposit from the Irondale Bank. The record also shows that she collected the rentals from the house on the 40 acres of the High Hill property. However, the record shows that Pansy Gryder did not examine the tax returns she filed with Cordial Gryder to ascertain if these amounts were reported. The record shows no knowledge by Pansy Gryder of the amounts paid by DeVille for the Gryder's personal expenses and on property they purchased. In fact, the record is reasonably clear that she left all business

arrangements to her husband. She testified that when he brought the returns for her to sign, she signed them without reviewing them, relying on her husband to properly report their income. While this may have been gross negligence on her part, it does not establish fraud. We therefore conclude that respondent has failed to prove by clear and convincing evidence any fraud on the part of Pansy Gryder. This fact, however, does not mean that the statute of limitations bars the collection from Pansy Gryder of the tax due with respect to her joint returns with Cordial Gryder for each of the years 1967 through 1970. Because of fraud on the part of Cordial Gryder, the joint returns of Cordial and Pansy Gryder were false and fraudulent and therefore the collection the tax from Pansy Gryder is not barred by the statute of limitations. *Pendola v. Commissioner,* 50 T.C. 509, 521 (1968), and cases there cited. See also *Rodney v. Commissioner,* 53 T.C. 287, 309 (1969). Therefore, unless petitioner Pansy Gryder is an innocent spouse within the meaning of section 6013(e), which will be hereafter discussed, she is liable for any tax due with respect to the years 1967 through 1970 on the joint returns she filed with her husband Cordial Gryder.

* * * * * * *

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[7]Section 6653(b) provides as follows:

SEC. 6653. FAILURE TO PAY TAX.

* * *

(b) Fraud. — If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, the subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

Petitioner Pansy Gryder contends that she is an innocent spouse within the meaning of section 6013(e).[1] This section provides that where a joint return has been made from which there is omitted gross income properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return, the other spouse shall be relieved of liability for tax for such taxable year to the extent such liability is attributable to such omission from gross income if the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and taking into account whether or not the other

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[1]Section 6013(e) provides as follows:

Sec. 6013. JOINT RETURNS OF INCOME TAX BY HUSBAND AND WIFE.

• • •

(e) Spouse Relieved of Liability in Certain Cases. —

(1) In general. Under regualations prescribed by the Secretary, or his delegate, if —

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of and had no reason to know of, such omission, and

(C) taking into account, whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission,

then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.

spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax attributable to such omitted income. We will assume here that the record establishes an omission from gross income attributable to Cordial Gryder in each of the years here in issue in excess of 25 percent of the amount of the gross income stated in the return for the purpose of discussing the application of section 6013(e). It would appear that such is the fact, although until a recomputation is made this fact will not be completely clear with respect to each year. However, in our view Pansy Gryder has failed to show that she had no reason to know of the omission of gross income, and the evidence affirmatively shows that she significantly benefited from the items omitted from gross income. Mrs. Gryder testified that she really did not review the returns before she signed them. Mrs. Gryder knew of the unreported rental and dividend income and at least some of the unreported interest income. She also knew of the work being done at High Hill and the purchase of certain of the properties purchased in the names of Cordial and Pansy Gryder. She knew that many of the household bills for utilites and other items were not paid from her account or the joint account she had at the Jonesburg Bank with Cordial Gryder. Had she carefully reviewed the returns, she would have known of the omitted rental, interest and dividend income and would have questioned the source of the funds with which many of the of the payments for personal expenses of the Gryders were made and become aware of the omitted income.

Furthermore, it is completely clear from this record that Mrs. Gryder significantly benefited from the omission from income from the joint returns she filed with Cordial Gryder. The record shows that all of the real estate purchased with funds from DeVille, except one piece, was in the joint names of Cordial and Pansy Gryder and that after Mr. Gryder's death on December 3, 1975, Mrs. Gryder had complete title to these properties. The

record shows that upon condemnation of a part of the O'Fallon property in 1978, Mrs. Gryder received between $70,000 and $78,000 from the State of Missouri. The record also shows that Mrs. Gryder owned and, at the time of the trial, was operating the business of Gryder Motors. The record shows that although there was little in the probate estate of Mr. Gryder since most of the properties were his name jointly with Mrs. Gryder, she was his sole heir and inherited any property which was in his probate estate. In our view is is not inequitable under these circumstances to hold Mrs. Gryder liable for the taxes on the omitted income. She is not liable for the addition to taxes for fraud since respondent has failed to establish in accordance with the requirements of section 6653(b) any fraud on her part.

* * * * * * *

Decision will be entered under Rule 155.

APPENDIX D

UNITED STATES TAX COURT

Estate of Cordial Gryder, Deceased, Pansy Gryder, Executrix, and Pansy Gryder,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent

Docket No. 3785-76

Decision

Pursuant to the opinion of the Court filed August 27, 1981, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income taxes due from the petitioners as follows:

Year	Deficiency
1967	$ 3,669.74
1968	45,766.22
1969	2,818.86
1970	12,467.81
1971	3,839.13;

That there are additions to the tax due from petitioner Estate of Cordial Gryder, Deceased, Pansy Gryder, Executrix, under the provisions of I.R.C. § 6653(b), as follows:

Year	Addition under I.R.C. § 6653(b)
1967	$ 1,834.87
1968	22,883.11
1969	1,409.43
1970	6,233.91
1971	4,289.07; and

That there are no additions to the tax due from petitioner Pansy Gryder under the provisions of I.R.C. § 6653(b) for the years 1967 to 1971, inclusive.

/s/ Irene F. Scott
Judge.

Entered: January 15, 1982

APPENDIX E

UNITED STATES TAX COURT

Estate of Cordial Gryder, Deceased, Pansy Gryder, Executrix,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

Docket No. 9423-76

Decision

Pursuant to the opinion of the Court filed August 27, 1981, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That the following statement shows the liability due from petitioner as transferee of assets of DeVille Motors, Inc., transferor, for unpaid income taxes and additions to the tax under the provisions of I.R.C. § 6653(b) for the taxable years 1967, 1968, 1969, and 1970:

1967

Income tax	$25,297.00
Addition to tax (I.R.C. § 6653 (b))	12,649.00
Liability	$37,946.00

plus interest on the above liability as provided by law from July 21, 1976, to the date of payment.

1968

Income tax	$34,326.85
Addition to tax (I.R.C. § 6653 (b))	17,163.43
Liability	$51,490.28

plus interest on the above liability as provided by law from July 21, 1976, to the date of payment.

1969

Income tax	$12,873.00
Addition to tax (I.R.C. § 6653 (b))	6,437.00
Liability	$19,310.00

plus interest on the above liability as provided by law from July 21, 1976, to the date of payment.

1970

Income tax	$36,703,00
Addition to tax (I.R.C. § 6653 (b))	19,491.00
Liability	$56,194.00

plus interest on the above liability as provided by law from July 21, 1976, to the date of payment.

/s/ Irene F. Scott
Judge.

Entered: January 15, 1982

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1597

September Term, 1982

Estate of Cordial Gryder, Deceased, Pansy Gryder, Executrix, and Pansy Gryder,

Appellants,

vs.

Commissioner of Internal Revenue,

Appellee.

Judgment Filed April 29, 1983

Appeal from the United States Tax Court.

This cause came on to be heard on the record of the United States Tax Court, appendix and briefs of the respective parties and was argued.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Tax Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

April 29, 1983

Costs taxed in favor of Appellee:

Costs of brief for recovery from Appellants: $196.13

Order entered in accordance with opinion

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, 8th Circuit.

APPENDIX G

Constitution of United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

Title 26, United States Code

§ 6013. Joint returns of income tax by husband and wife

* * * * * * * *

(e) Spouse relieved of liability in certain cases.—

(1) In general.—Under regulations prescribed by the Secretary, if—

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and

(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission,

then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.

Special rules.—For purposes of paragraph (1)—

(A) the determination of the spouse to whom items of gross income (other than gross income from property) are attributable shall be made without regard to community property laws, and

(B) the amount omitted from gross income shall be determined in the manner provided by section 6501(e) (1) (A).

§ 6501. Limitations on assessment and collection

(a) General rule.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * * * * *

(c) Exceptions.—

(1) False return.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun with assessment, at any time.

* * * * * * * *

(e) Substantial omission of items.—Except as otherwise provided in subsection (c)—

(1) Income taxes.—In the case of any tax imposed by subtitle A—

General rule.—if the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. For purposes of this subparagraph—

(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item.

(B) Constructive dividends.—If the taxpayer omits from gross income an amount properly includible therein under section 551(b) (relating to the inclusion in the gross income of United States shareholders of their distributive shares of the undistributed foreign personal holding company income), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

APPENDIX I

Federal Rules of Evidence

Rule 801. Definitions

The following definitions apply under this article:

* * * * * * *

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

> **(1) Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

No. 83-379

In the Supreme Court of the United States

OCTOBER TERM, 1983

ESTATE OF CORDIAL GRYDER, DECEASED,
PANSY GRYDER, EXECUTRIX, AND PANSY GRYDER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-379

ESTATE OF CORDIAL GRYDER, DECEASED,
PANSY GRYDER, EXECUTRIX, AND PANSY GRYDER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Tax Court, in a memorandum decision, determined that petitioners were liable for deficiencies in tax and civil fraud penalties. The court of appeals affirmed, rejecting petitioners' arguments that the statute of limitations barred the assessments, that the Tax Court had erred in admitting certain evidence, and that petitioner Pansy Gryder should be relieved of liability for deficiencies on returns filed jointly with her husband on the theory that she was an "innocent spouse." Petitioners seek review of these holdings.

1. The pertinent facts may be summarized as follows: Cordial Gryder, now deceased, was the principal officer and shareholder of DeVille Motors, Inc. During 1967-1971, Cordial caused DeVille to pay, out of its corporate bank accounts, numerous personal expenses incurred by him and his wife, Pansy Gryder (Pet. App. A2). Corporate funds

were used to pay the Gryders' household utility bills, to finance improvements to their home, to make mortgage payments on their real estate, and to purchase stock and other property titled in their names and devoted exclusively to their use. The Gryders failed to report these disbursements as income on their joint tax returns, and DeVille reduced its own tax liability by deducting many of the items as business expenses. In December 1975, Cordial was convicted in federal district court of willfully filing fraudulent tax returns for 1967-1971. Pet. App. A2.[1]

The Commissioner in February 1976 sent deficiency notices to the Gryders, and in July 1976 sent deficiency notices to DeVille, asserting deficiencies in tax and civil fraud penalties under Section 6653(b) of the Code.[2] Petitioners sought redetermination of the deficiencies in the Tax Court, which (with minor exceptions not relevant here) upheld the Commissioner's proposed assessments.[3] It determined that there were underpayments of tax on the Gryders' joint returns for 1967-1971, and found as a fact that each such underpayment was due to Cordial's fraud (Pet. App. A11). It also found that there were underpayments of tax on DeVille's corporate returns for 1967-1970, that these underpayments were due to Cordial's fraud, and that Cordial was liable for DeVille's taxes and penalties as its transferee (*ibid.*). The court of appeals unanimously affirmed (Pet. App. A1-A5).

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[1]Cordial died while his conviction was on appeal to the Eighth Circuit, which thereupon vacated the conviction and remanded for dismissal on mootness grounds (Pet. App. A2). The criminal case is not involved here.

[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

[3]The Tax Court's memorandum opinion, excerpts of which are printed in petitioners' appendix (Pet. App. A7-A22), is unofficially reported at 50 T.C.M. (P-H) 1777 (1981).

2. Petitioners contend (Pet. 8-12) that the Commissioner was barred by the statute of limitations from asserting tax deficiencies and fraud penalties against them. The court of appeals correctly held (Pet. App. A4) that "[t]his contention is wholly without merit."

Section 6501(a) provides, as a general rule, that taxes "shall be assessed within 3 years after the return was filed." Section 6501(c)(1) sets forth an exception to the general rule applicable "[i]n the case of a false or fraudulent return with the intent to evade tax," providing that, in such cases, "the tax may be assessed * * * at any time." Petitioners do not challenge the Tax Court's finding, upheld on appeal (Pet. App. A4), that their returns for 1967-1971 were "false or fraudulent" and were filed "with the intent to evade tax." Because the statute explicitly permits the Commissioner to assess the tax "at any time" in fraud cases, it is immaterial that the deficiency notices (mailed in 1976) were sent more than three years after the fraudulent returns were filed.

There is no merit to petitioners' contention (Pet. 11) that the Commissioner "arbitrarily delay[ed]" in sending the deficiency notices and that this supposed delay should somehow cause the general three-year statute of limitations, applicable in non-fraud cases, to apply here. Petitioners cite no authority for the proposition that a statute of limitations can be construed on an ad hoc basis, depending on a court's perception of how much time the government really needs, on the facts of a particular case, to assert a particular claim. Indeed, it has long been established that statutes of limitations "must receive a strict construction in favor of the Government" (*E.I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924)), and that the United States is not subject to the defense of laches. *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940).

Contrary to petitioners' contention (Pet. 10-11), this case has nothing to do with the circuit conflict represented by cases like *Dowell* v. *Commissioner*, 614 F.2d 1263 (10th Cir. 1980), petition for cert. pending, No. 82-1873, and *Badaracco* v. *Commissioner*, 693 F.2d 298 (3d Cir. 1982), cert. granted, No. 82-1453 (May 16, 1983). This Court in *Badaracco* granted certiorari to resolve a conflict among the circuits as to whether the filing of a nonfraudulent *amended* return, subsequent to the filing of a fraudulent *original* return, has the effect of triggering the general three-year limitations period of Section 6501(a). As noted below (Pet. App. A4 n.6), none of the taxpayers involved in this case filed (nor do they contend that they filed) amended returns for any of the tax years at issue. The *Badarraco* line of cases has no relevance here, and there is no reason to delay disposition of this petition pending the Court's decision in *Badaracco*.

3. Petitioners also contend (Pet. 12-15) that the Tax Court erred in permitting the government to prove the contents of certain documents by means of secondary evidence. The Tax Court found (Pet. App. A16) that the originals of the documents had been destroyed, negligently but in good faith, by IRS employees after Cordial's criminal trial. The court of appeals held this factual finding not clearly erroneous, and accordingly concluded that the government's secondary evidence — consisting of photocopies of certain corporate records, cancelled checks, bank statements, and loan ledgers, as well as the transcript of testimony at Cordial's criminal trial — was admissible, under Rule 1004 of the Federal Rules of Evidence, to prove the originals' contents.[4] The courts below properly rejected

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[4]Rule 1004 provides that "other evidence of the contents of a writing * * * is admissible if (1) [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith * * *."

(Pet. App. A3, A16-A17) petitioners' contentions (reiterated here) that the record concerning the IRS' good faith was "hopelessly confused" (Pet. 14) and that the trial transcript was inadmissible hearsay (Pet. 15-17). In any event, these factual questions do not merit this Court's review.

4. Finally, petitioner Pansy Gryder contends (Pet. 17-22) that she should be relieved of liability for tax deficiencies on returns filed jointly with her husband on the theory that she was an "innocent spouse." Section 6013(e)(1) provides that a spouse shall be relieved of liability if he or she "establishes that in signing the [joint] return he or she did not know of, and had no reason to know of," the omissions from income, and if, "taking into account whether or not [such spouse] significantly benefited directly or indirectly from the [omitted items] and taking into account all other facts and circumstances, it is inequitable to hold [him or her] liable" for the resulting tax deficiencies. The Tax Court specifically found (Pet. App. A20-A22) that petitioner failed to carry her burden of proving her entitlement to the "innocent spouse" exception, and the court of appeals held (*id.* at A5) that this finding was not clearly erroneous. There is no basis for further review of this factual question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1983

DOJ-1983-11